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No. 89-20

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STERLING ELECTRIC, INC.,
Petitioner,
v.
PARTS AND ELECTRIC MOTORS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The petition raised two separate issues, one relating to the market for the tying product—replacement parts for electric motors—and the second relating to the market for tied products—electric motors.[1] With respect to the tying-product market, petitioner demonstrated that the court of appeals' reliance on the physical uniqueness of petitioner's replacement parts as a proxy for market power is inconsistent with this Court's tying decisions and conflicts with decisions of other courts of appeals.

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[1] Respondent incorrectly claims that petitioner violated this Court's Rule 28.1. Br. in Opp. 2. Petitioner's Rule 28.1 statement was included in its application for an extension of time. *Sterling Electric, Inc.* v. *Parts and Electric Motors, Inc.*, Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at n.1 (filed May 16, 1989).

With respect to the tied-product market, petitioner showed that the court below erroneously failed to examine whether there was an adverse effect on competition in that market, a result wholly inconsistent with this Court's decisions and with those of other courts of appeals.

Respondent, in its opposition, has elected to ignore the substantial antitrust issues presented in the petition.[2] Instead, respondent distorts petitioner's arguments and the opinions of the court below by suggesting that petitioner has failed to preserve any issues. Moreover, respondent argues that this Court is precluded from reviewing the antitrust issues decided by the court of appeals because petitioner failed to seek this Court's review of a plainly interlocutory order of the first panel of the court of appeals. In effect, respondent has conceded that, if the two questions presented in the petition are properly before this Court—and they are—then review of the decisions of the Seventh Circuit is warranted. Because respondent's procedural claims lack merit, the Court should grant the petition to clarify the law concerning the legality of tying arrangements.

I. THE ISSUES RAISED IN THE PETITION WERE NOT WAIVED

Respondent would have this Court believe that the court of appeals held that petitioner waived the issues raised by the petition and that the court below did not address the merits of petitioner's antitrust claims. In fact, the court of appeals addressed the merits of both questions raised in the petition.[3] The court of appeals

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[2] Respondent asserts that "[n]either decision [of the court of appeals] decided any issue of antitrust law." Br. in Opp. 7. Even the most cursory reading of the opinions of the court below contradicts this assertion.

[3] The first panel of the court of appeals determined whether these arguments were sufficient to support judgment n.o.v. or a new trial. Pet. App. 33a. The only issue before the second panel was whether these issues warranted a new trial. Pet. App. 8a.

held, however, that a single, limited issue was waived and, in contrast, that all other legal issues were preserved.

The first panel of the court of appeals held that "the issue of *threatened market power in the tied product market* was waived at trial by Sterling." Pet. App. 32a (emphasis added).[4] To determine if this particular issue had been properly preserved, the court of appeals engaged in a thorough and searching analysis of the trial court record. See Pet. App. 25a-32a. This is the only finding of waiver by the court below. With respect to the market for the tying product, petitioner did not waive *any* issues. With respect to the market for the tied product, petitioner waived only the limited issue of the need to show threatened market power in that market.

Contrary to the implications in respondent's opposition, the court below went beyond the question of whether the need to show market power in the tied-product market was preserved and addressed the merits of the antitrust issues presented in the petition. After determining that this single issue had been waived because of petitioner's failure to object to jury instructions, the court summarized petitioner's remaining arguments raised in its post-trial motions and appeal:

> (1) P & E failed to prove the existence of two separate products; (2) there was no proof of market power in the tying product market; (3) there was no proof of any foreclosure of competition in the tied product market; and (4) there was no proof of a threat to acquire market power in the tied product market.

Pet. App. 33a. The court noted that petitioner had waived the fourth issue but that "[t]he remaining con-

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[4] Petitioner, recognizing the court of appeals' finding of waiver (Pet. 5), has not sought review of this issue in its petition. Respondent's contentions to the contrary (Br. in Opp. 5) are simply wrong.

tentions must be considered separately as potential support for the judgment n.o.v. and for the conditional retrial order." *Id.* at 33a-34a.[5] Thus, the court of appeals recognized that these issues (the second and third of which are presented in the petition) were properly preserved for review and addressed the merits of each of these three arguments.[6]

The first question presented by the petition is whether the court of appeals erred in using the physical uniqueness of a tying product as a proxy for market power in the market for that product. This issue was argued before and decided by the court of appeals in a way that

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[5] Respondent, quoting from petitioner's closing argument, also claims that petitioner's theory at trial was limited to the contention that there was only a single market for "electric motor services" and that petitioner never argued the issues presented in the petition to the jury. Br. in Opp. 4-5. While petitioner did argue to the jury that parts and motors were not separate products, this was not its only argument. Alternatively, petitioner argued (Tr. 895) that it did not have market power over the parts market:

> Now, even though there is no separate market in any economically meaningful sense, Dr. Skoog [respondent's expert] claims Sterling had market power in the parts market. . . . In the . . . parts market, Sterling certainly does not have any more than one-tenth of a percent of that market. Now, if that's not market power in Dr. Skoog's motor market, how is it market power in this broad parts market?

See also Pet. App. 23a (proferred jury instruction defining market as "replacement parts for electric motors"). Petitioner also argued that competition in the motor market was not restrained. Tr. 891-93.

[6] Respondent did not argue in the court of appeals that these three remaining issues were waived and instead briefed them on the merits. Reply Brief of Appellant at 6-9, *Parts and Electric Motors, Inc.* v. *Sterling Electric, Inc.*, 826 F.2d 712 (7th Cir. 1987). Its waiver argument in the court of appeals was limited to the single issue of the likelihood of the acquisition of power in the tied-product market. Brief of Appellant at 24-33, *Parts and Electric Motors, Inc.* v. *Sterling Electric, Inc.*, 826 F.2d 712 (7th Cir. 1987); Reply Brief of Appellant at 15-17.

conflicts with decisions of other courts and raises a substantial question about the proper interpretation of language in this Court's decision in *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2 (1984). Pet. App. 8a-11a, 35a-36a. There is not even the slightest suggestion in either court of appeals' opinion that this argument—or any other argument regarding the market for the tying product—was waived.

The second question presented by the petition is whether a manufacturer's distribution arrangement for a product with less than one percent of the tied-product market can ever have an adverse effect on competition in that market. This issue was also properly preserved by petitioner, and the court of appeals addressed the merits of this issue. Pet. App. 36a-37a. Indeed, respondent's entire argument regarding waiver in the tied-product market is predicated on its repeated mischaracterization of the petition. For example, respondent states that "petitioner now argues that respondent failed to present proof of the likelihood of market power in the market for electric motors (the tied product)." Br. in Opp. 2.[7] But this is not petitioner's argument. Petitioner does not challenge the court of appeals' finding that the issue of the likelihood of acquiring power in the market for the tied product was waived. Rather, the petition raises the question of the need to show an *adverse effect on competition*. Pet. 16-21. This issue was not waived.[8]

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[7] *See also* Br. in Opp. 5, 11.

[8] Respondent also contends that this Court is somehow barred from reviewing the court of appeals' affirmance of the jury's "rule of reason" verdict. Br. in Opp. 11-12. The court below affirmed the jury's verdict under the rule of reason standard (Pet. App. 37a-38a), and there is nothing that prevents this Court from reviewing that judgment of the court of appeals. Respondent has previously argued that it was not required to show an adverse effect on competition because the jury found a *per se* violation. Reply Brief of Appellant at 12, *Parts and Electric Motors, Inc.* v. *Sterling Electric,*

In making its waiver argument in this Court, respondent focuses exclusively upon a single jury instruction, implying that objections to the instructions are the only means available to preserve an issue on appeal.[9] But the basic arguments concerning the tying and tied market presented in the petition are relevant to the sufficiency of the evidence and thus are preserved by being raised in the motions for directed verdict and for judgment n.o.v., and the court of appeals found that they were. See Pet. App. 22a, 24a.[10] The whole point of the petition is that this case presents an excellent vehicle for clarifying what minimum evidentiary showing must be made to establish market power in the tying-product market and an adverse effect on competition in the tied-product market. These issues warrant review, as we explained in the petition, and which respondent has not challenged, because the courts of appeals have required different minimum showings to prove an antitrust violation.

Inc., 826 F.2d 712 (7th Cir. 1987). Respondent apparently believes (incorrectly) that there is no role for appellate review of antitrust jury verdicts to determine whether the evidence in the record reasonably could support the conclusion that there was an adverse effect on competition. *See* Pet. App. 17a (Posner, J., dissenting).

[9] In any event, Jury Instruction 28a cannot be interpreted as a concession that the relevant tying *market* was Sterling replacement parts. Those parts were merely the tying *product* within the relevant market of "replacement parts for electric motors." Pet. App. 23a (petitioner's proferred jury instruction).

[10] The difference is well illustrated by comparing this case to *City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987). In *Kibbe*, the legal question presented was whether a city could be held liable under 42 U.S.C. § 1983 for inadequate training solely on the basis that its training had been grossly negligent. The problem was that the City itself had proposed gross negligence as the proper instruction and there was evidence in the record to support the jury's finding under that standard. Thus, the failure properly to instruct the jury was fatal to the City's ability to obtain review of that legal issue.

II. THIS COURT IS NOT PRECLUDED FROM REVIEWING THE ISSUES PRESENTED IN THE PETITION

The first panel of the court of appeals reversed the district court's grant of judgment n.o.v., vacated the conditional new trial order and remanded the case to the district court for reconsideration of the new trial order. Pet. App. 39a. Respondent argues that petitioner's failure to seek review of the first panel's order remanding the case to the district court precludes this Court from considering the arguments raised by the petition. Br. in Opp. 13-17.[11] Thus, respondent argues that this Court may not review the antitrust issues decided by the court of appeals because petitioner failed to seek review of an interlocutory order of the court of appeals.

At the time of the first panel's decision, petitioner was placed in a difficult position because the court of appeals' remand order clearly made the case interlocutory. If the district court granted petitioner a new trial and it won on retrial, then the important legal issues decided by the

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[11] Respondent argues that the petition was not timely filed. There is no dispute, however, that the petition was due on July 7, 1989 (Pet. 2) and was filed on that date. Respondent's reliance on *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), is wholly misplaced. There, Minneapolis-Honeywell petitioned the court of appeals for review of a three-part FTC order, but abandoned its attacks on Parts I and II of the order. The court of appeals sustained the challenge to Part III. This decision finally determined the merits of the FTC's order. After the time to petition for rehearing before the court had expired, the FTC sought an order affirming Parts I and II. When the court of appeals entered a new judgment on this request, the FTC filed a petition for a writ of certiorari to review the judgment regarding Part III. This Court held that the petition was not timely. 344 U.S. at 213. The key difference between this case and *Minneapolis-Honeywell* is that here the first panel's decision remanding the case to the trial court was not "for all purposes final." Indeed, it was not final for any purposes. It remained open for the district court to retry the whole case. In that posture, it was clearly interlocutory.

court of appeals would become irrelevant. On the other hand, petitioner could seek certiorari immediately and hope to avoid a retrial. This Court's rule, however, is that ordinarily it does not review interlocutory decisions. See, *e.g.*, *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916).

Because there was nothing about the case that justified pretermitting the ordinary process of litigating the issues on remand and then seeking subsequent review by the court of appeals with a right to seek review in this Court by way of certiorari, petitioner decided not to petition this Court at that time. Remarkably, respondent, while content to accept the fact that the decision of the first panel is inconsistent with decisions of both this Court and other courts of appeals, argues that the Court should deny certiorari solely because petitioner took the more expensive route of litigating the matter to final judgment in the lower courts and then seeking review here. In sum, respondent seeks to punish petitioner for having spared the Court the need to consider two separate petitions for a writ of certiorari.[12] Obviously, to deny certiorari on that ground will strongly encourage litigants to seek premature review of decisions of the lower courts. When the Court is otherwise burdened

[12] What makes respondent's contention here particularly galling is that it is almost certain that it would have opposed certiorari in 1988 primarily on the ground that the decision of the court of appeals was interlocutory. Given respondent's inability to proffer even the slightest defense of the first panel's decision on the merits, the only bases for opposing certiorari at that time would have been to claim 1) that the issues were premature and 2) as it has done here, that the issues decided by the court of appeals after being fully briefed on the merits by both sides were nevertheless somehow not properly before this Court.

with more than 5000 petitions each year, it makes very little sense to adopt a rule that will encourage additional filings.

Respondent's argument is not only procedurally wrong, it is also predicated on a fundamental misconception of this Court's power to review judgments. When this Court reviews a judgment of a court of appeals, its authority is not limited to reviewing the specific issues decided by that particular panel. Instead, this Court may reach back and review *all* issues decided by the court of appeals. See, *e.g.*, *Scott* v. *United States*, 436 U.S. 128 (1978); *Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964) (per curiam); *Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941). In *Mercer* v. *Theriot*, 377 U.S. at 153-54, this Court stated:

> We now "consider all of the substantial federal questions determined in the earlier stages of the litigation . . . ," *Reece* v. *Georgia*, 350 U.S. 85, 87, for it is settled that we may consider questions raised on the first appeal, as well as "those that were before the Court of Appeals upon the second appeal." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257.

Thus, respondent's effort to turn this Court's attention from the merits presented by this petition in this case is clearly without basis.[13]

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[13] This Court has characterized arguments similar to that raised by respondent as "based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the Circuit Court of Appeals by certiorari," *Hamilton-Brown Shoe Co.*, 240 U.S. at 257-58, and as "clearly without substance," *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955) (multiple judgments of state courts). Moreover, the fact that the second panel of the court of appeals relied upon law of the case is irrelevant to this Court's review. This Court has stated:

> [A]lthough in this instance the interlocutory decision may have been treated as settling "the law of the case" so as to furnish

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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the rule for the guidance of . . . the District Court, and the Court of Appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings.

Hamilton-Brown Shoe Co., 240 U.S. at 258-59 (citations omitted).